LAW AND DISORDER :

POLITICAL INTRUSIONS INTO THE LEGAL PROCESS*

by **Robert Richter**

In 1970 Norval Morris and Gordon Hawkins published a little book entitled *The Honest Politician's Guide to Crime Control*. It was never a mega best seller but it should have been compulsory reading for all aspiring politicians, their advisers, judges, lawyers and law enforcement officers and agencies.

One of its principal theses was the proposition that most crime is generated by politicians who for one reason or another criminalise conduct which is not within the natural purview of the core prohibitions for organized and civil society. The authors' prefatory note starts:

> We offer a cure for crime - not a sudden potion nor a lightening panacea but rather a legislative and administrative regimen which would substantially reduce the impact of crime_.
> Crime is our major domestic problem and much of the world shares in it. A third of the people of America are afraid to walk alone at night in their communities. In cities of more that half a million some 40% of the inhabitants confess to this fear_.

Their solution involves profound analysis of the overreach of the criminal law; a harm reduction and cost benefit examination of several focal nodes of what is considered criminal conduct; and the reasoned assessment which, with a bit of clear thinking and non-moralising, can drastically cut what we call crime in our society by as much as 60%. A consummation devoutly to be wished? Not if you are in politics it seems.

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Twenty-six years later the problem in the United States seems much worse and no one has yet had the courage to de-politicise law and order to a point where a sensible bi-partisan approach can tackle the real issues. There are nearly 2 million people in prison in the US and we read about a thrice convicted felon (whose third felony was theft of a piece of pizza) who gets 20-to-life for that heinous crime. The story is much the same in Australia except that we seem to lag some years before repeating the disasters of our great ally. Success in politics, it seems, is all about giving the appearance of being in control. Not of actually being in control - just seeming to be so. Any Law and Order agenda is about saying "we are in, or if you let us we will be, in control" when in fact we are not and cannot be.

Contemporary politics - leaving aside the economy - is about creating fear, promising a mastering of the fear created and thereby earning the gratitude of the electorate. Thus in the last election in NSW there was an almost comical Law and Order auction to see who was toughest on crime. In Victoria, the Law and Order plank in the policy platform features prominently in all elections

In this paper I want to examine some recent political incursions into the criminal justice arena. When I say "recent", I don't want to be taken as pointing the finger at the present State government to the exclusion of the previous one which shares a great deal of responsibility for a good many of the developments. Nor do I wish to absolve the Federal government which in its own way has sought to impinge on the exercise of judicial power in significant ways. Nor do I make a point of saying that the Victorian government is better or worse than other State governments who all appear equally taken with the notion that Law and Order is a winner.

Unacceptable political intrusion into the criminal process needs to be defined because the process is not immutable and is in need of overhaul every now and again. Indeed, the only way to reform is through the legislature which, after all, is a collection of politicians.

I am concerned rather with the kind of intrusion - executive as well as legislative - which seeks and finds its only demonstrable justification in the "let's get tough" school of Law and Order politics. It involves not merely the utterances of individual politicians or indeed ministers of the Crown seeking to influence the way in which criminal justice is administered; rather it covers a spectrum and process which fans out something like this:

- generate fear about the increasing prevalence of crime;
- attribute the cause to the existence of "too much protection for criminals", assert that punishment is too lenient;
- place fault where it does not belong - e.g with the judiciary for being "soft" or with the legal profession for having the temerity to insist on proper process;
- propose measures which have nothing to do with the incidence or prevention of crime but which give the semblance that something is being done, usually following upon police pressure for greater powers;
- pass legislation which gives greater powers to police and which at the same time fetters either the jurisdiction or the discretion of the courts and gives the illusion that someone has taken the situation in hand.

In other words, create the genie and release it, then pretend to take control of it. At the end of the day, since you've really done nothing about the underlying problem, you can repeat the same process as required.

This is what has happened with many Law and Order issues over recent years with police powers and sentencing being the most obvious fields of action. More is clearly on the agenda for the future. The paper delivered by Peter Faris QC at this Congress two days ago seems to me almost a blue print for the kind of agenda which I predict a populist Law-and-Order government would seek to follow in a quest to appear to be doing something about crime and punishment while in reality doing nothing. Thus with greater police powers than ever before failing to make any impact, the focus intensifies upon the notion that suspects have too many rights and safeguards against the might of the State and that Judges have the temerity to think of themselves as standing independently between the individual and the State and somehow shield criminals from their just deserts.

Indeed, I suspect that Faris QC knows something we have not yet been let in on in Victoria, namely that there is an agenda to abolish committals, remove the right to silence, change trial by jury, and make sure that those accused of crime have no real chance to defend themselves. When for "suspect" you read "citizen", the enormity of the agenda is patent. Speaking as a civil libertarian, there is good reason for fear for the future.

The broad areas of political intrusion in recent years can be looked at under a number of headings.

Attempts to influence, restrict or circumvent the exercise of judicial power and discretion.

Leaving aside the many Acts in Victoria which purport to oust the jurisdiction of the Supreme Court with the pretence that s.85 of the Victorian Constitution Act somehow provides a protection for that jurisdiction (which is untrue), and leaving aside the question whether judicial independence is compromised by the abolition or restructure of quasi-

judicial bodies, we have in recent times witnessed a concerted and sustained onslaught upon the exercise of some of the more important discretions entrusted to our Judges.

Sentencing discretion and judicial independence

In this arena we have witnessed a combination of blatantly populist attacks and tactics calculated to influence the way judges exercise their ultimate discretion in the criminal process as well as legislative constraints upon the exercise of that discretion. The attacks have included criticism in the mass media by, amongst others, the Attorney General who might be said to have blurred the distinction between the functions of a political minister of the Crown and the special and the traditional obligations of the First Law Officer to defend the judiciary. There have been sustained public attacks which affect the status and respect attaching to the position of Judges whether of the Supreme or County Courts. The process of attack and blame, using the mass media, has involved a trivialisation of the sentencing process as a cheap alternative to actually dealing with profound social ills. Why spend money on proper corrections programs when you can run a straw poll in a daily newspaper which is both breath-taking in its simplicity and absence of method as well as being useless in its outcomes? Is there a serious student who will defend the recent survey? No. Why was it done? To give an appearance of concern and to build up expectations that sentencing will be toughened yet again so that when it happens, the illusion of control can be wheeled out.

Serious Violent and Sexual Offender Legislation

Such legislation was intended to and has produced serious constraints on sentencing - in particular the accumulation requirements - and is populating our prisons with sex offenders at an extraordinary rate. Yet one finds that the most significant proportion of those receiving such sentences are people whose crimes are old, if not ancient, raising the question of what is actually being done to reduce the incidence of sex crimes in the community apart

from dependence on the doctrine of general deterrence which we all know to be almost wholly illusory.

Perennial calls for tougher sentences for drug traffickers

Those using the same illusory and deceptive reliance on general deterrence - are a cheap political shot at shifting the blame from politicians, too cowardly to deal with the drug problem in an intellectually and morally honest way, onto Judges who know that prison is not the solution but only a pretence at coping with a far broader social problem.

Public attacks on the judiciary

Such attacks and legislative mandates imposed and yet to be imposed in response to what are generally auto-generated "crises" of confidence in the system have the most profound implications for the separation of powers and judicial independence. They bespeak an unjustified distrust of the judiciary which is after all selected and appointed by an executive which ostensibly picks the best people for the job and then appears to kick them in the teeth for trying to do the best they can. There is no doubt that the political attacks on the judiciary will make it much harder to secure the services of the most talented for the position. Short term political point scoring will reap long term damage to the integrity of the system.

∑ ***Contempt***

∑ The ability to initiate and maintain prosecutions for contempt of court is so closely linked to the maintenance of the integrity of the legal process that the assignment of any of those functions to a political office is deplorable and must be seen as downgrading the concern for the independence of that process. This is especially so with the clear politicisation of the office of Attorney General which has come about as a result of the

apparent unwillingness of the First Law Officer in Victoria to rise to the defence of the judiciary when it has been attacked by the popular media.

∑ ***Legislative intervention in the exercise of public policy discretion***

∑ It has become clear in both the State and Federal jurisdiction that politicians are unwilling to trust the courts with the exercise of some particularly important public policy discretions. The High Court's decision in *Ridgeway* , relating as it did to the public policy considerations with respect to illegal conduct by police, was seen as a threat to certain agent provocateur operations. In consequence, the Federal Parliament passed urgent legislation legitimizing what was otherwise clearly illegal conduct on the part of law enforcement officers. In its anxiety not to appear soft on crime, it went to the extent of purporting to do so retrospectively so that courts, which would otherwise exclude evidence of certain illegal drug importations by the police as being too inimical to public policy, might be forced to admit evidence which on a proper exercise of discretion would have been excluded. The validity of the legislation is yet to be tested in the High Court. However, its passage through the Parliament with retrospectivity bespeaks of the willingness to create bad legislative precedent for the political expedience of appearing to be tough on crime.

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∑ Similarly, the Victorian Parliament moved to counteract the effects of the High Court's decision in *Dietrich's Case* pre-empting the exercise of discretion to stay or adjourn a trial because of the inability of an accused to have proper representation. The Victorian effort has the superficial appeal of giving the trial judge the power to order that legal aid be provided in certain circumstances. However, the operation of the new s360A of the Crimes Act seems to me to create enormous problems for an accused.

∑ The creation of Victorian Legal Aid with the Attorney having the power to impose binding directions with respect to the provision of aid is a matter of concern. Of greater concern is the unavailability of sufficient resources to fund adequate availability of

aid to people facing criminal charges. The arbitrary guidelines which Legal Aid Victoria is forced to apply with respect to the funding of committals, summary matters and indictable trials are not a function of the assessment of need but rather an expression of the shortage of funds to accommodate what might otherwise be seen as applications meriting legal aid. At a time when the State (and the Commonwealth) expend vast sums to get convictions, the ability of citizens, whose liberties and futures are put in jeopardy, to defend themselves is being constantly eroded.

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∑ The constant public endorsement by government of the claim that "the rights of victims are being ignored in preference to the rights of offenders" constitutes a dangerous rhetoric which threatens the rights of all. There is a constant public campaign which assumes that those who are charged are already "offenders". They are not and it is precisely because they are not that their rights need to be upheld until such time as they are convicted. Even then, as offenders, they are entitled to the protection of the law so that they get their appropriate measure of justice by way of sentence: not less, but certainly not more than they ought to get.

Expansion of police powers without at the same time creating sufficient mechanisms for control by the courts

In 1993 the Victorian Parliament granted sweeping new powers to police investigators with respect to the compulsory acquisition of names and addresses, fingerprints, and the acquisition of body samples for forensic procedures. These powers were given on the basis that they were needed to combat what was represented as a rising tide of crime. Needless to say, there was no such "tide" other than a concerted campaign by the Police Association which had demanded those powers for some years. The utility of such a grant

of powers has yet to be demonstrated in terms of their impact on crime rates or clear-up rates for that matter. I do not believe that they have or will produce any change of significance. Yet the balance of civil liberties in Victoria - as happens elsewhere - was seriously altered by the 1993 legislation on no more of a demonstrable basis than the assertion that it was needed to get tough on crime.

In arming the police with these additional powers, there was a semblance given of judicial control over the coercive acquisition of evidence. Yet in reality, when one examines the provisions of the Crimes Act, one finds that for example, in seeking to resist an order for the taking of body samples,

> *A relevant suspect in respect of whom an application is made–*
> *(a) is not a party to the application; and*
> *(b) may not call or cross-examine any witnesses; and*
> *(c) may not address the Court, other than in respect of any matter referred to in sub-section (3) (a) to (h).*

From this, it seems clear that in succumbing to police pressure for stricter law and order powers, the Parliament - in effect the executive - was not prepared to leave to the courts any real determination of fact or exercise of discretion. There was no need in this instance to oust the jurisdiction of the courts since in reality the courts were given little more than a semi-administrative function.

These are but examples of recent changes. There are numerous other instances of the changing balances of rights and powers in response to political sensitivity to give the appearance of running a tough Law and Order agenda.

The problem with such an agenda is its tendency to feed upon itself because it certainly does not produce other results on which it can built. The dangers of such a rolling agenda is that in the not too distant future it will become almost irresistible for politicians to remove the most significant procedural and substantive safeguards to freedom.

The failure to take positive steps which might ameliorate the perception that we live in a society which is subject to ever growing threat from criminals

The final matter I want to raise is the political intrusion by what seems to me to be a deliberate choice on the part of our politicians NOT to intervene in the legal process by failing to tell the community the truth, namely, that things are not nearly as bad as they are represented to be and by deliberately choosing NOT to tell the community that most crime is the creation of politicians. This brings me back to Norval Morris and the Honest Politician.

In Victoria, and for reasons of failure of political nerve, we have recently missed a unique opportunity for innovative reform of drug laws. We have also drawn back from sweeping reforms in the law relating to street prostitution.

Instead of creating and overseeing a progressive and rehabilitative State corrections system, we are in the process of turning the system over to private enterprise so that not only can one get votes by giving the appearance of being tough on crime, one can at the same time create the opportunity for private profit out of Law and Order.

I would therefore like to pose the question for the Attorney General of Victoria:

How far is the government prepared to go with its Law and Order agenda before actually tackling the causes of most crime in this State? Does the Attorney have plans to abolish committals? To abolish the right to silence? To impinge on and perhaps reverse burdens of proof?

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